Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Assessment and Collection of Regulatory Fees for Fiscal Year 2007	)	MD Docket No. 07-81
	)	

COMMENTS OF THE WIRELESS COMMUNICATIONS ASSOCIATION INTERNATIONAL, INC.

The Wireless Communications Association International, Inc. ("WCA") hereby submits its comments on the Commission's *Notice of Proposed Rulemaking* ("*NPRM*") in the above-captioned proceeding.[1] Specifically, WCA briefly addresses: (1) the Commission's proposed methodology for calculating regulatory fees payable by Broadband Radio Service ("BRS") licensees in future years; and (2) the Commission's proposal to impose regulatory fees on providers of interconnected Voice over Internet Protocol service ("VoIP").

WCA does not object to the Commission's proposal to impose BRS regulatory fees for FY2007 utilizing for the last time its historic approach of charging a separate fee for each call sign.[2] WCA agrees that it is of more importance that the Commission develop for future years an approach to charging BRS regulatory fees that fairly allocates the burden among all licensees. The Commission recognizes that just last year it adopted a new regulatory fee formula for BRS in WT Docket No. 03-66, under which a BRS licensee's annual regulatory fee was to be calculated on a per-MHz basis and then tiered according to market size, *i.e.*, BRS licensees in Basic Trading Areas ("BTAs") 1-60 would pay the highest fee, those in BTAs 61-200 would pay

[1] *Assessment and Collection of Regulatory Fees for Fiscal Year 2007*, Notice of Proposed Rulemaking, MD Docket No. 07-81, FCC 07-55 (rel. Apr. 18, 2007).

[2] *Id.* at ¶ II.A.3. Appropriately, the *NPRM* does not propose to revisit the Commission's prior determination that Educational Broadband Service ("EBS") licensees should be exempt from regulatory fees.

a lesser fee, and those in BTAs 201-493 would pay the lowest fee.[3] Even though no participant in WT Docket No. 03-66 asked for reconsideration of the new regulatory fee formula when it was adopted last year, the *NPRM* now requests comment on whether the Commission should modify the formula in a manner that would preserve the tiered per-MHz approach while being "sensitive to rural operators in less populated areas."[4]

WCA is surprised that the Commission is seeking to reopen this issue, given that the approach adopted last year was specifically designed to protect licensees of spectrum in rural areas and has not been opposed by any rural interests. Nonetheless, if the Commission is committed to reexamining the matter in the instant docket, it should adopt WCA's prior recommendation that the Commission utilize a per-MHz/pops approach when calculating regulatory fees for BRS licensees.[5] Unlike the case with the Commission's tiered per-MHz approach, WCA's proposed per-MHz/pops formula is based on the exact population within a BRS licensee's service area and thus eliminates entirely the possibility that rural BRS licensees would pay regulatory fees disproportionate to the number of persons they actually serve.

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[3] *Id.*, n.8, *citing Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands*, Order on Reconsideration and Fifth Memorandum Opinion and Order and Third Memorandum Opinion and Order and Second Report and Order, 21 FCC Rcd 5606, 5756-9 (2006) ("*BRS Reconsideration Order and Second R&O*").

[4] *Id.* at ¶ II.A.3.

[5] *See* WCA Comments on Further Notice of Proposed Rulemaking, WT Docket No. 03-66, at 32-33 (filed Jan. 10, 2005) ["WCA Further Notice Comments"]; WCA Reply Comments on Further Notice of Proposed Rulemaking, WT Docket No. 03-66, at 36-37 (filed Feb. 8, 2005) ["WCA Further Notice Reply Comments"].

Notwithstanding the fact that support for WCA's proposal was "nearly unanimous,"[6] the Commission initially rejected WCA's per-MHz pops approach as being too complex. Now, however, the Commission acknowledges in the *NPRM* that the per-MHz formula it adopted last year is complex in and of itself,[7] and it is unlikely that any further refinements for the benefit of rural BRS licensees would render the formula any less complex than what WCA has already proposed.[8] Quite frankly, the Commission cannot "have its cake and eat it, too." If it wants to assure that licensees in rural areas do not pay unfair regulatory fees, some measure of complexity will be necessary. Applying a MHz/pop fee provides the fairest approach for those BRS licensees with thinly-populated service areas, and can be introduced with less complexity than any other alternative.[9]

The Commission also proposes to begin imposing regulatory fees on providers of interconnected VoIP service.[10] However, that proposal does not address, much less resolve, the

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[6] *BRS/EBS Reconsideration Order and Second R&O*, 21 FCC Rcd at 5758. The Commission noted that "several commenters indicated that clear standards need to be established so that BRS licensees may readily and in a consistent manner determine the population in their covered areas, as well as ascertain these areas' boundaries." *Id.* (footnote omitted). The "several commenters" identified by the Commission all supported adoption of WCA's proposed per-MHz/pops approach. *See id.* n. 943 and the comments cited therein. Those parties were merely pointing out that the Commission also needed to more clearly define the boundaries of a BRS licensee's authorized service area by specifying that great ellipses should be used in drawing service area boundaries. As discussed *infra*, the Commission needs to resolve that issue for reasons separate and apart from the matter of regulatory fees.

[7] *See NPRM.* at ¶ II.A.3.

[8] In WT Docket No. 03-66, concern was expressed that BRS licensees might not be able to accurately ascertain the boundaries of their service areas or calculate the population within those service areas unless certain rules and policies were clarified. *See BRS Reconsideration Order and Second R&O*, 21 FCC Rcd at 5758-9. As WCA and others pointed out in that proceeding, a clear definition of how the chord used to "split the football" is drawn is necessary for a variety of reasons, not the least of which is the need to provide BRS licensees certainty as to exactly where and to whom they are authorized to provide service. *See, e.g.*, WCA Further Notice Comments at 33; WCA Further Notice Reply Comments at 36 n. 97. Hence, since the Commission must address this issue for reasons separate and apart from the question of regulatory fees, the issue should not be a barrier to adoption of WCA's proposed per-MHz/pops approach. The Commission can eliminate the remaining uncertainty about the matter by adopting WCA's proposal that the agency require the use of the great ellipses for determining the specific boundaries of adjoining BRS service areas. *See* WCA Petition for Partial Reconsideration, WT Docket No. 03-66, at 10-12 (filed July 19, 2006).

[9] *See BRS Reconsideration Order and Second R&O*, 21 FCC Rcd at 5758-9.

[10] *See NPRM* at ¶ II.A.5.

serious question of whether the Commission has authority to collect regulatory fees from interconnected VoIP service providers. For instance, while the Commission asserts that its general authority to impose regulatory fees under Section 9 of the Communications Act of 1934, as amended (the "Act") authorizes the imposition of regulatory fees on interconnected VoIP service providers, the legislative history of Section 9 indicates that the fees only were intended to apply to Title III licensees and entities otherwise licensed or certificated before the Commission.[11] VoIP service, of course, is neither licensed nor certificated by the Commission. For that reason alone, the Commission's statutory authority for imposing regulatory fees on non-licensed, non-certificated interconnected VoIP providers requires far greater explanation than what is offered in the *NPRM*.

Also dubious is the Commission's suggestion that the necessary legal authority can be drawn from its decision to impose Universal Service Fund ("USF") contribution obligations on interconnected VoIP providers.[12] The Commission's asserted basis for legal authority in the USF context was Section 254(d) of the Act, not Section 9, and the two statutory provisions are fundamentally different both as to their purpose and their underlying policies. Section 254(d) is specifically intended to "preserve and advance universal service," and thus gives the Commission permissive authority to impose USF contribution obligations on providers of interstate telecommunications service not mentioned in the statute "if the public interest so requires."[13] Section 9, however, includes no corollary provisions or any other language that could be sensibly interpreted as affording the Commission the same authority over

[11] *See* H. Conf. Rep. No. 103-213, at 499 (1993), reprinted at 1993 U.S.C.C.A.N. 1188 (citing "regulatory fees to be collected by the Commission *from its licensees*") (emphasis added) ["Conference Report"].

[12] *See NPRM* at ¶ II.A.5, n. 16, *citing Universal Service Contribution Obligations for Providers of Interconnected Voice Over Internet Protocol (VoIP) Service*, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518, 7541 (2006).

[13] 47 U.S.C. § 254(d).

interconnected VoIP providers where regulatory fees are concerned. Yet, the *NPRM* fails to even acknowledge that this problem exists.

Assuming for purposes of argument only that the Commission were to nonetheless conclude that it has the requisite legal authority to impose regulatory fees on interconnected VoIP providers, it must still comply with Section 9's mandate that those fees only "recover the costs" of the regulatory activities specified in the statute, and that the fees must be "adjusted to take into account factors that are *reasonably related to the benefits provided to the payor of the fee by the Commission's activities* . . . ."[14] Likewise, the legislative history of Section 9 states that any amendments to the Commission's schedule of regulatory fees must "ensure [that] such fees are reasonably related to the benefits provided to the payor of the fee by the Commission's activities."[15] Unfortunately, WCA cannot comment on whether the Commission's proposal satisfies these requirements, since the *NPRM* neither proposes a specific regulatory fee for interconnected VoIP providers nor provides any clue as to how the Commission intends to apply the cost factors specified in Section 9 to the interconnected VoIP regulatory fee. In particular, nothing in the *NPRM* indicates whether the Commission has calculated the full-time equivalent number of employees ("FTEs") who perform the relevant regulatory activities, "adjusted to take into account factors that are reasonably related to the benefits" provided to interconnected VoIP providers by virtue of those activities.[16]

Instead of specifying a regulatory fee on which interconnected VoIP providers and other interested parties could comment, the Commission broadly suggests that its unspecified fee for interconnected VoIP providers might be based on the revenue-based approach it uses for

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[14] *Id.*, § 159(a)(1), (b)(1)(A) (emphasis added).

[15] Conference Report at 499.

[16] *See* 47 U.S.C. §§ 159(b)(1)(A).

interstate telecommunications service providers or, alternatively, the numbers-based approach it uses for CMRS providers.[17] No matter which avenue the Commission takes, however, the costs and benefits associated with the Commission's regulation of interconnected VoIP providers clearly are not commensurate with those associated with the Commission's regulation of interstate telecommunications or CMRS providers, and the regulatory fees imposed on interconnected VoIP providers therefore must be substantially less. For example, since the Commission has not extended all of its Title II regulations to non-Title II interconnected VoIP providers, the Commission cannot assume that the costs of regulating those providers are comparable to those associated with regulating interstate telecommunications and CMRS providers. Interconnected VoIP providers do not necessarily hold Commission spectrum licenses do not enjoy license rights akin to those enjoyed by Title III licensees, nor do they impose the regulatory costs on the Commission that are imposed by CMRS providers. In addition, and again strictly by way of example, interconnected VoIP providers (licensed or otherwise) do not receive USF support, do not have the same interconnection rights as Title II carriers, and do not have access to the Commission's complaint procedures when consumers take action against them.

Lastly, the Commission must take care to avoid any framework under which Commission spectrum licensees that provide interconnected VoIP service pay twice for the same services, Any "double recovery" by the Commission of the same cost is impermissible under Section 9. Rather, if the Commission imposes regulatory fees on interconnected VoIP providers, it may only recover from those providers the costs associated with regulating them, and those must be separate and distinct from fees charged to recover costs associated with regulating Commission

[17] *See id.* at ¶ II.A.5.

spectrum licensees, which costs should be accounted for in the fees already assigned to those licensees.[18]

WHEREFORE, for the reasons set forth above, WCA requests that the Commission issue a *Report and Order* in this proceeding in accordance with the recommendations in these comments.

Respectfully submitted,

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May 3, 2007

[18] Similarly, the Commission should clarify that a BRS licensee that provides CMRS service will only be required to pay the regulatory fee assigned to BRS licensees (whether it be the per-call sign fee currently in effect or whatever revised fee the Commission adopts in this proceeding for future fiscal years). Again, any costs and benefits associated with regulating BRS are already encompassed by the BRS regulatory fee. Absent any evidence to the contrary, forcing BRS providers to pay both the BRS regulatory fee and the CMRS regulatory fee when they offer CMRS service would amount to a double recovery that is not permitted under Section 9.